

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 LARRY MICHAEL FULKERSON,

4 Plaintiff,

5 v.

6 ALLSTATE INSURANCE, et al.,

7 Defendants.
8

3:19-cv-00729-MMD-CLB

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE¹

9 Before the court is Plaintiff Larry Fulkerson's ("Fulkerson"), application to proceed *in*
10 *forma pauperis* (ECF No. 1), and his *pro se* civil rights complaint (ECF No. 1-1). For the
11 reasons stated below, the court recommends that Fulkerson's *in forma pauperis* application
12 (ECF No. 1) be granted, and his complaint (ECF No. 1-1) be dismissed, with prejudice.

13 **I. IN FORMA PAUPERIS APPLICATION**

14 A person may be granted permission to proceed *in forma pauperis* ("IFP") if the
15 person "submits an affidavit that includes a statement of all assets such [person] possesses
16 [and] that the person is unable to pay such fees or give security therefore. Such affidavit
17 shall state the nature of the action, defense or appeal and affiant's belief that the person is
18 entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir.
19 2000) (en banc) (stating 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner
20 actions).

21 The Local Rules of Practice for the District of Nevada provide: "Any person who is
22 unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP].
23 The application must be made on the form provided by the court and must include a financial
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25
26 ¹ This Report and Recommendation is made to the Honorable Miranda M. Du, United
27 States District Judge. The action was referred to the undersigned Magistrate Judge pursuant
to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

1 affidavit disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

2 "[T]he supporting affidavit [must] state the facts as to [the] affiant's poverty with some
3 particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir.
4 1981) (quotation marks and citation omitted). A litigant need not "be absolutely destitute to
5 enjoy the benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331,
6 339 (1948).

7 A review of the application to proceed IFP reveals Fulkerson cannot pay the filing fee;
8 therefore, the court recommends that the application (ECF No. 1) be granted.

9 **II. SCREENING STANDARD**

10 Prior to ordering service on any defendant, the Court is required to screen an *in forma*
11 *pauperis* complaint to determine whether dismissal is appropriate under certain
12 circumstances. See *Lopez*, 203 F.3d at 1126 (noting the *in forma pauperis* statute at 28
13 U.S.C. § 1915(e)(2) requires a district court to dismiss an *in forma pauperis* complaint for
14 the enumerated reasons). Such screening is required before a litigation proceeding *in forma*
15 *pauperis* may proceed to serve a pleading. *Glick v. Edwards*, 803 F.3d 505, 507 (9th Cir.
16 2015).

17 "[T]he court shall dismiss the case at any time if the court determines that – (A) the
18 allegations of poverty is untrue; or (B) the action or appeal – (i) is frivolous or malicious; (ii)
19 fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief against
20 a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(A), (B)(i)-(iii).

21 Dismissal of a complaint for failure to state a claim upon which relief may be granted
22 is provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii)
23 tracks that language. When reviewing the adequacy of a complaint under this statute, the
24 court applies the same standard as is applied under Rule 12(b)(6). See, e.g., *Watison v.*
25 *Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) ("The standard for determining whether a
26 plaintiff has failed to state a claim upon which relief can be granted under § 1915(e)(2)(B)(ii)
27 is the same as the Federal Rule of Civil Procedure 12(b)(6) standard for failure to state a

claim.”). Review under Rule 12(b)(6) is essentially a ruling on a question of law. See *Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

The Court must accept as true the allegations, construe the pleadings in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are “held to less stringent standards than formal pleadings drafted by lawyers[.]” *Hughes v. Rowe*, 449 U.S. 5, 9 (1980) (internal quotations marks and citation omitted).

A complaint must contain more than a “formulaic recitation of the elements of a cause of actions,” it must contain factual allegations sufficient to “raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading must contain something more. . . than. . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.” *Id.* (citation and quotation marks omitted). At a minimum, a plaintiff should include “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570; see also *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

A dismissal should not be without leave to amend unless it is clear from the face of the complaint the action is frivolous and could not be amended to state a federal claim, or the district court lacks subject matter jurisdiction over the action. See *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995); *O’Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

III. SCREENING OF COMPLAINT

In his complaint, Fulkerson sues Defendants Allstate Insurance and Allstate Insurance Agent Shawna Honea under 28 U.S.C. § 1332 for a purported breach of contract. (See ECF No. 1-1.) The court first notes that while the plaintiff in this case is listed as “Larry Michael Fulkerson,” it appears Fulkerson is deceased pursuant to documentation attached to the complaint (See ECF Nos. 1-5, 1-6), and this case is really being brought by Fulkerson’s son, Heath Vincent Fulkerson (“Heath”). (See ECF Nos. 1-2, 1-3.) Heath purports to be Fulkerson’s “special administrator” pursuant to Nevada Revised Statute (“NRS”) 140.040. (ECF No. 1-2.) However, Heath does not assert himself as a named

1 insured, additional insured, an “insured person” or any other individual related to the alleged
2 August 2, 2019 Allstate policy between Allstate and Fulkerson. Instead, the sole basis for
3 Heath’s standing to bring this action is the assertion that he is the “administrator of the
4 estate.” (*Id.*) However, the only Plaintiff listed is Larry Michael Fulkerson. Accordingly, the
5 complaint should be dismissed as Fulkerson is not a proper party to this litigation.

6 The court further notes that the allegations in this case are nearly identical to those
7 in a companion case filed by Fulkerson in November 27, 2019, Case No. 3:19-cv-00710-
8 RCJ-WGC. That case also names Allstate Insurance and Shawna Honea as defendants, in
9 addition to Enterprise Rent-A-Car, for a purported breach of contract. (See ECF No. 1, Case
10 No. 3:19-cv-00710-RCJ-WGC.) Duplicative litigation by a plaintiff proceeding *in forma*
11 *pauperis* may be dismissed as malicious under 28 U.S.C. § 1915(e). See *Cato*, 70 F.3d at
12 1105 n.2 (citing *Bailey v. Johnson*, 846 F.2d 1019, 1021 (5th Cir. 1988) (holding that
13 repetitious litigation of virtually identical causes of action is subject to dismissal as
14 malicious)); *Pittman v. Moore*, 980 F.2d 994, 994-95 (5th Cir. 1993) (holding that it is
15 malicious for a “pauper” to file a lawsuit that duplicates allegations of another pending federal
16 lawsuit by the same plaintiff).

17 Based on Fulkerson not being a proper party to this litigation and the duplicative
18 nature of this action, the court recommends that the complaint be dismissed, with prejudice,
19 as amendment would be futile.

20 **IV. CONCLUSION**

21 For the reasons articulated above, the court recommends that Fulkerson’s application
22 to proceed *in forma pauperis* (ECF No. 1) be granted, and his complaint (ECF No. 1-1) be
23 dismissed, with prejudice, as amendment would be futile.

24 The parties are advised:

25 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
26 Practice, the parties may file specific written objections to this Report and Recommendation
27 within fourteen days of receipt. These objections should be entitled “Objections to

1 Magistrate Judge's Report and Recommendation" and should be accompanied by points
2 and authorities for consideration by the District Court.

3 2. This Report and Recommendation is not an appealable order and any notice
4 of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District
5 Court's judgment.

6 **V. RECOMMENDATION**

7 **IT IS THEREFORE RECOMMENDED** that Fulkerson's application to proceed *in*
8 *forma pauperis* (ECF No. 1) be **GRANTED**;

9 **IT IS FURTHER RECOMMENDED** that the Clerk **FILE** the complaint (ECF No. 1-1);
10 and,

11 **IT IS FURTHER RECOMMENDED** that Fulkerson's complaint (ECF No. 1-1) be
12 **DISMISSED, WITH PREJUDICE.**

13 **DATED:** March 23, 2020.

14 
15 **UNITED STATES MAGISTRATE JUDGE**